

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Kansas Workers Compensation Fund raises the issue regarding whether claimant is entitled to permanent partial disability benefits pursuant to K.S.A. 44-501(a) in that claimant was not disabled for a period of at least one week from earning full wages at work at which the employee was employed. The Appeals Board notes this issue was not raised before the Administrative Law Judge and is being raised for the first time before the Appeals Board. K.S.A. 1995 Supp. 44-555c allows for review by the Board "upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." The Appeals Board has consistently held in the past that issues not raised before the Administrative Law Judge will not be considered by the Appeals Board for the first time. See Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966).

The Appeals Board, therefore, finds that this issue is not properly before the Appeals Board, having not been decided originally by the Administrative Law Judge and this issue is dismissed.

In order to consider the nature and extent of claimant's disability, a brief recitation of the facts is appropriate. Claimant was a welder and sheet metal worker for respondent for a number of years when he started experiencing symptoms in his right upper extremity and right shoulder in June 1991. He was examined by Dr. Kenneth D. Zimmerman at Boeing Central Medical on October 4, 1991 and diagnosed with epicondylitis calcification, tendinitis median right elbow and a strained right shoulder. Dr. Zimmerman also felt claimant may possibly have early right carpal tunnel syndrome, calcification of the right shoulder and early degenerative arthritis of the right hand. Therapy was prescribed and claimant was returned to work with specific limitations. Claimant was rescheduled for a return examination on October 11, 1991 but failed to appear. On January 29, 1992 claimant was terminated for excessive absenteeism. Dr. Zimmerman assessed claimant a 6 percent permanent partial impairment of the right upper extremity which converts to a 4 percent whole body rating. Of this upper extremity rating, 1 percent was to the shoulder and 5 percent to the elbow, hand and wrist.

Claimant sought no medical treatment until December 1993, nearly two years after the date of his termination. At that time he was referred to Dr. David Brake for upper extremity nerve conduction studies. Dr. Lawrence Blaty found, after reviewing the EMGs performed by Dr. Brake, that claimant had mild ulnar nerve symptomatology at the left elbow and mild bilateral carpal tunnel syndrome. Dr. Blaty examined claimant on March 7, 1994, at which time claimant exhibited the above symptomatology and, further, suffered from symptoms of ulnar neuropathy and mild shoulder strain. The history provided to Dr. Blaty indicated that claimant's problems had begun five years earlier. Claimant indicated he had been treated for upper extremity and wrist complaints and was prescribed wrist splints in 1989 but was unable to recall the name of the doctor providing the treatment. When asked about the cause of claimant's ongoing symptomatology Dr. Blaty was unable to say within a reasonable degree of medical certainty that claimant's symptomatology stemmed from his employment with respondent.

The Administrative Law Judge awarded claimant a 16 percent permanent partial disability based upon Dr. Blaty's 16 percent functional impairment rating. The Appeals Board finds the medical opinion of Dr. Blaty to be insufficient upon which to base an award for permanent disability.

K.S.A. 44-501 and K.S.A. 44-508(g), require that claimant prove his entitlement to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. The only credible evidence in the record supporting an award to claimant is the impairment rating provided by Dr. Zimmerman. Dr. Zimmerman found claimant to have a 1 percent impairment of the upper extremity for the shoulder and a 5 percent impairment of the upper extremity for the elbow, hand and wrist which, when combined, equals a 6 percent impairment to the upper

extremity. As the shoulder is involved, the upper extremity rating must be converted to a 4 percent permanent partial impairment to the whole body. The Appeals Board awards claimant a 4 percent permanent partial whole body functional disability for the injury suffered through January 29, 1992.

K.S.A. 1991 Supp. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant returned to work after his initial difficulties in October 1991 and continued to work at a comparable wage until January 29, 1992 when he was terminated for excessive absenteeism. The Appeals Board finds the claimant has failed to rebut the presumption contained in K.S.A. 1991 Supp. 44-510e. As such, claimant is limited to his functional impairment only.

The evidence indicates that claimant's upper extremity symptomatology began in October 1991 and continued through January 29, 1992. There is no evidence to indicate respondent had knowledge that claimant suffered any symptomatology prior to the onset in October 1991. There is also no evidence in the record to support a finding that claimant was in any way handicapped prior to October 1991.

K.S.A. 1991 Supp. 44-567 provides in part:

"(a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

"(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund."

It is the employer's burden to prove that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 1991 Supp. 44-567(b) provides in part:

"(b) In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

The Appeals Board finds the evidence insufficient to support a finding that claimant was handicapped in any fashion prior to October 1991 and further finds respondent has failed to prove knowledge of any preexisting impairment. It is respondent's burden to prove not only that claimant was handicapped but also that claimant suffered an injury which probably or most likely would not have occurred but for this preexisting physical or mental

impairment. *Id.* at 247. The Appeals Board finds the entire liability for this award shall remain with the respondent and its insurance carrier.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated January 8, 1996 shall be, and is hereby modified and claimant is granted an award against respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury sustained through January 29, 1992 for a 4 percent permanent partial whole body disability. Claimant is entitled to 415 weeks permanent partial general body disability at the rate of \$21.70 per week for 415 weeks, totaling \$9,005.50.

As of May 13, 1996, there will be due and owing to claimant 223.57 weeks permanent partial disability compensation at the rate of \$21.70 per week in the sum of \$4,851.47 for a total due and owing of \$4,851.47 which is ordered paid in one lump sum minus amounts previously paid. Thereafter, the remaining balance of \$4,154.03 shall be paid at the rate of \$21.70 per week for 191.43 weeks until fully paid or until further order of the Director.

Respondent is denied reimbursement from the Kansas Workers Compensation Fund for any of the costs, expenses or fees associated with this litigation. The Fund shall be responsible for its own attorney fees.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Barber & Associates	
Transcript of regular hearing	\$245.10
Deposition of Lawrence Blaty, M.D.	\$228.80
Deposition of Jerry D. Hardin	\$199.20
Deposition Services	
Deposition of Kenneth Zimmerman, M.D.	\$225.40

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Tom Clarkson, Wichita, KS
Frederick L. Haag, Wichita, KS
Kendall Cunningham, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director